

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	4:98CR3076-2
	)	
Plaintiff,	)	<b>MEMORANDUM</b>
vs.	)	<b>AND ORDER</b>
	)	
JOSE J. NUNEZ,	)	
	)	
Defendant.	)	

This matter is before the court on the defendant's notice of appeal (filing 279) and the clerk's recent memo (filing 280) asking whether the defendant may proceed in forma pauperis and whether a certificate of appealability will issue. The notice of appeal was filed with reference to the court's order entered on June 1, 2007 (filing 278), which denied the defendant's motion to reopen the case.

Before the defendant's appeal can proceed, a certificate of appealability must issue. See Fed. R. App. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court has rejected a constitutional claim on the merits in the course of denying a § 2255 motion, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" in order to meet the standard contained in § 2253(c). Slack v. McDaniel, 529 U.S. 473, 484 (2000). In contrast, when a district court denies a § 2255 motion on procedural grounds without reaching the applicant's underlying constitutional claims on the merits, a certificate of appealability should issue under § 2253(c) when "the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id.

The defendant's motion to reopen the case (filing 276) was, in effect, an attempt to file a second or successive motion to vacate his sentence pursuant to 28 U.S.C. § 2255, without the required authorization from the United States Court of Appeals for the Eighth Circuit. In fact, the Court of Appeals has previously denied the defendant authority to file another § 2255 motion. (See filing 263.) Therefore, a certificate of appealability will not be issued.

While the clerk's memo recites that the defendant has not been permitted to proceed in forma pauperis in the district court, he was determined to be financially unable to obtain an adequate defense in his criminal case, and was appointed counsel. Because the appeal appears to be taken in good faith, even though a certificate of appealability will not be issued, the defendant may continue to proceed in forma pauperis pursuant to Fed. R. App. P. 24(a)(3).

IT IS ORDERED that:

1. A certificate of appealability shall not issue in this case;
2. The defendant may proceed in forma pauperis on appeal; and
3. The clerk of the court shall transmit a copy of this memorandum and order to the United States Court of Appeals for the Eighth Circuit.

June 18, 2007.

BY THE COURT:

*s/ Richard G. Kopf*  
United States District Judge